SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-906

J. LOYD PARKER, JR.,
Petitioner,

v.

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, J. Loyd Parker, Jr., respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1974.

OPINIONS BELOW

The Opinion of the Court below is reported at 498 F.2d 625; a copy of that Opinion appears in Appendix I, pp. 1a-10a, *infra*, and of the Judgment of the Court below, in Appendix II, p. 11a, *infra*. A copy of the Order denying the Petition for Rehearing, entered on October 24, 1974, appears in Appendix III, p. 12a, *infra*. The Order Adopting Findings and Conclusions of Magistrate, issued by the

United States District Court for the Northern District of Texas, is not reported. A copy appears in Appendix IV, p. 13a, *infra*. The Findings, Conclusions and Recommendation of the United States Magistrate are not reported. A copy appears in Appendix V, pp. 14a-21a, *infra*. The Opinion of the Court of Criminal Appeals of the State of Texas (hereinafter referred to as "Texas Court") in the 1963 Application for a Writ of Habeas Corpus is reported at 370 S.W.2d 882, and a copy appears in Appendix VI, pp. 22a-23a, *infra*. The Opinion of the Texas Court on the appeal from the conviction is reported at 457 S.W.2d 638, and a copy appears in Appendix VII, pp. 24a-30a, *infra;* and its Opinion on the post-conviction application for the writ is reported at 485 S.W.2d 585, and a copy appears in Appendix VIII, pp. 31a-37a, *infra*.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on August 5, 1974. A timely Petition for Rehearing *En Banc* was denied October 24, 1974, and this Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a State hold that a defendant incompetent to stand trial has waived his right to a contemporaneous jury verdict on sanity or insanity at the time of the commission of the offense and a judgment of acquittal upon a verdict of insanity, as prescribed in the State Code of Criminal Procedure?

2. Where a defendant is found to be incompetent to stand trial a few months after the alleged offense

was committed and where State officials believed at that time that he would be found by a jury to have been insane at the time the crime was committed and thus be acquitted in conformance with State law, may State officials so deal with such defendant as to keep his case open and years later subject him to criminal liability?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment

The Fourteenth Amendment of the Constitution of the United States reads in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Code of Criminal Procedure

In 1963, at the time pertinent hereto, Article 932(b) of the Texas Code of Criminal Procedure read in pertinent part as follows:

> "Section 1. In any case where the question of the insanity of a defendant is raised and that issue is tried alone before the main charge or is tried in connection with the main charge, the jury *shall state* in their verdict *whether the defendant was sane or insane at the time the offense is alleged to have been committed* and whether the defendant is sane or insane at the time of the trial.
>
> "(a) *If the jury finds the defendant to have been insane at the time the offense is alleged to have been committed, the defendant shall stand acquitted of the alleged offense.*"[1]

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[1] Emphasis added throughout this Petition unless otherwise noted.

STATEMENT OF THE CASE

In May 1963, Petitioner was charged with murder with malice of his father in the District Court of Tarrant County, Texas, at Fort Worth. The question of Petitioner's insanity was raised. As set out above, the Texas Code of Criminal Procedure then mandated that the jury verdict in every such case include a finding of sanity or insanity as to both the legally critical times, the time of the offense as well as the time of the trial. It specified further that a verdict of insanity at the time of the offense would constitute a judgment of acquittal. Contrary to these imperatives of the law, the State prosecutors and the State District Court so conducted themselves that the only issue submitted to the jury in July 1963 was whether Petitioner was competent to stand trial. The jury was not permitted to consider, and consequently contrary to the statute did not state in its verdict, whether Petitioner was sane or insane at the time the offense was alleged to have been committed.

The State prosecutors resisted the submission of this issue to the jury because they evidently believed that the jury would find Petitioner insane at the time of the alleged offense. Doug Crouch, who was District Attorney for Tarrant County at that time, testified in 1969 as follows:

> "A. * * * The way this thing came about was that Judge 'Dutch' Winters, then a prosecutor on my staff, came into my office about five minutes before the time for the hearing or for the trial to start up here in this Courtroom and informed me that there were eight psychiatrists, that all eight of them, including the three that the State had asked to look at the man, were about to testify that the man was insane.

"Q. I see. Then what?

"A. And that *he also was insane at the time of the offense.* They were going to—I think either the majority of them or all of them—were going to testify that he was insane at both times.

"Q. I see. What did you do?

"A. I told Judge Winters, I said, 'Do you think you have a chance of winning up there in the Courtroom?'

"He said, 'We don't have a single witness except lay witnesses. I don't see how we could.'

"Then I asked him, I asked Dutch Winters if he could get an agreement then on insanity now and then reserve the insanity at the time of the offense so that he could be tried later on. *Of course, there would have been no trial if we had gone according to what the psychiatric testimony was supposed to have been* according to Judge Winters at that time." Appendix in the Court below (hereinafter referred to as "Ct. Apls. App."), 362-363.

Criminal District Judge J. E. Winters, who was then an assistant district attorney, testified likewise:

"A. Well, as I remember—I believe that the defendant's lawyer at that time, Mr. Cochran, and Mr. Tesner, had hired something like eleven psychiatrists. Each one of the psychiatrists found that Mr. Parker was insane.

"Q. *Both at the time of the trial and at the time of the offense?*

"A. *Yes.* The State had four psychiatrists that I remember and three out of the four said he was insane. We had one psychiatrist and after he discovered that there was that many of his brethren [*sic*] who held otherwise from his con-

clusions, he was hesitant about testifying." *Id.* at 380.

While he did intimate that he was prepared to go to trial on the insanity issue on the basis solely of lay testimony, Judge Winters' ultimate judgment was:

> "I told Mr. Crouch that day that in view of all the psychiatric evidence against the State of Texas, that it was my opinion that *Mr. Parker would be found insane.*" *Id.* at 383.

Judge Winters successfully devoted himself to persuading counsel retained by Petitioner's wife to withdraw the request which had been filed for a jury verdict of insanity as of the time of the commission of the alleged offense. As he testified, "at the time we had a pretty good hassle right here in this Courtroom, conference after conference, myself and the District Attorney and [counsel retained by Mrs. Parker] * * * and we did, after quite a bit of talk, come to an agreement whereby the allegation with reference to insanity at the time of the commission would be taken out of the petition and abandoned and that they would proceed on temporary insanity alone that I agreed, I agreed to go along with." Ct. Apls. App. 225.

As a consequence of this State action, only the issue of competency to stand trial was submitted to the jury in July 1963, not the issue of insanity at the time of commission. The jury verdict was thus limited to finding Petitioner incompetent to stand trial. At that time, Petitioner was obviously himself in no condition, as a matter of fact or law, to appreciate the significance of what was occurring with respect to his rights and liberty, nor in particular knowingly or in-

telligently to waive any right.[2] Petitioner's condition was such that the counsel retained for him by his wife testified, "we had very little communication with Mr. Parker." Ct. Apls. App. 228. Manifestly, Petitioner was incapable of waiving the uniquely valuable and vital right to be declared insane at the time of the commission, and thus stand acquitted. The short of this case is that if that waiver had not been accepted, according to the State's own expectations set forth above, Petitioner would have then received a judgment of acquittal and the State could constitutionally have instituted no further proceedings against him.

Following the finding that he was incompetent to stand trial, Petitioner was committed to the State Hospital for treatment. In 1969, the Director of the State Hospital certified him to be sane and he was found by a jury competent to stand trial. In June 1969, Petitioner was subjected to trial on the charge of murder with malice of his father in 1963. At the conclusion of the State's case, the defense rested. Evidently, 1969 counsel considered that it was too late to raise any question of insanity at the time of commission realistically or effectively.[3] Petitioner was found guilty and sentenced by the jury to ten years.

Petitioner's conviction was affirmed by the Texas Court (457 S.W.2d 638; Appendix VII, *infra*). Thereafter, Petitioner applied for a writ of habeas corpus to the State Court. The same Judge who had tried the case in the Texas criminal District Court heard and

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[2] Indeed, pretermitting the thorny legal question of whether a guardian appointed in a civil proceeding can waive any right of a defendant in a criminal proceeding, the fact is that no guardian had been officially appointed for Petitioner at that time. This appointment was made *following* the finding of incompetency.

[3] See p. 10, n. 4, *infra*.

denied the application. The Texas Court affirmed (485 S.W.2d 585; Appendix VIII, *infra*).

This Federal application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255 was denied by the United States District Court for the Northern District of Texas, and the Court below affirmed. On the issue of the State's depriving Petitioner of the provisions of its own criminal law, the Court of Appeals held, "[e]ven assuming we could find the state had an affirmative duty under its statute to submit the issue, the right remains purely one created by state statute and not a matter of constitutional mandate. *Hence, this claim is not cognizable on federal habeas corpus.*" 498 F.2d at 628; Appendix I at p. 6a, *infra*. This holding, critical to the judgment below, is manfestly erroneous; see pp. 13-14, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW IS IN IRRECONCILABLE CONFLICT WITH PATE v. ROBINSON, 383 U.S. 375 (1966), AND OTHER DECISIONS OF THIS COURT.

The holdings below are utterly antagonistic to those of this Court in *Pate* v. *Robinson*, 383 U.S. 375 (1966) and other cases. The refusal to provide Federal habeas corpus relief when a State has denied a hearing and failed to make any finding as to insanity at the time of the commission of the alleged offense, upon being confronted with evidence of such insanity, cannot be reconciled with fundamental principles of Constitutional law expounded by this Court.

A. The Decision Below Is In Conflict With Pate v. Robinson

The basic issues before this Court in *Pate* v. *Robinson*, 383 U.S. 375 (1966), cannot be distinguished

from those confronting the Courts below in this case. In both cases, defendant made a claim of insanity at the time of commission as well as incompetency at the time of trial; and there was evidence acknowledged by the State to the effect that the defendant was insane at the time of the offense. Procedurally, in both cases there was no hearing or finding as to insanity; and the conviction had been sustained through the State procedures and a Federal habeas corpus petition duly filed. As in this case, in *Pate* v. *Robinson* the justification proffered to the Federal habeas corpus Court by the State for its failure to hold a hearing and make a finding was that any such right had been waived:

> "The State concedes that the conviction of an accused person while he is legally incompetent violates due process, *Bishop* v. *United States,* 350 U.S. 961 (1956), and that state procedures must be adequate to protect this right. It insists, however, that Robinson intelligently waived this issue by his failure to request a hearing on his competence at the trial; and further, that on the basis of the evidence before the trial judge no duty rested upon him to order a hearing *sua sponte.*" *Id.* at 378.

This Court's rejection of that defense in *Pate* v. *Robinson* should have been followed by the Court below:

> "The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384.

Identically, it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the State Court and jury determine his criminal responsibility *vel non* at the time of the commission of the offense, together with his capacity to stand trial, and as prescribed in the State law. In all law, psychology and common sense, how can a defendant incompetent to stand trial be held to possess sufficient personal and human mind, will, capacity and understanding to waive a statutory commandment that a finding be made as to his insanity at the time of the offense, a finding which dictates a judgment of acquittal?

In *Pate* v. *Robinson,* this Court held that the State conviction could not stand. That holding demands reversal here. In *Pate* v. *Robinson,* this Court remanded the case but expressed grave doubt that Robinson could or should be retried "[s]ince we do not think there could be a meaningful hearing on [competency] at this late date," 383 U.S. at 377, which was seven years after the conviction.[4] In this case, the denial of a hearing on insanity as expressly directed by the State Code of Criminal Procedure occurred almost a

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[4] Likewise, there could have been no meaningful hearing in 1969 as to Petitioner's sanity at the time of the commission of the offense six years earlier. In 1969 Petitioner was sane and competent; as a practical matter it would have been impossible for the 1969 jury to perceive or understand either how he appeared and acted in 1963 or the nature and basis of the psychiatric evidence that he had been insane when the crime was committed in 1963. The nub of the matter is that if Petitioner had received the due process to which he was entitled at the hands of the State in 1963, he would have been acquitted by reason of insanity at the time of the alleged offense; and there could have been no trial for that offense at that time or any other time. Accordingly, it blinks reality to contend that the 1969 trial has relevancy to this Petition.

dozen years ago. To suffer the judgment below to go unreviewed by this Court is to countenance and encourage defiance of *Pate* v. *Robinson*.

B. The Judgment Below, Sustaining The Trial And Conviction Of Defendant Whose Insanity At The Time Of Commission Was Evidenced But Not Adjudicated, Cannot Be Reconciled With The Bedrock Precept Of Criminal Law, Embraced By The Due Process Clause And Expressed By This Court, That Criminal Responsibility And Punishment May Be Imposed Only Upon Those Who Were Sane At The Time Of Commission.

The State Court conduct sustained below inexorably embraces the result that the State of Texas has tried and convicted a man who was insane at the time the crime was committed. Any such result betrays hostility to the assumptions consistently made by this Court as to the most fundamental principles of criminal law, certainly antedating the adoption of the Constitution and its concept of Due Process.

This Court has always accepted it as axiomatic that criminal trials must conform faithfully to:

> "* * * the humane principle, existing at common law and recognized in all the cases * * * that, 'to make a complete crime cognizable by human laws, there must be both a will and an act'; and 'as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act, consequent upon such vicious will.' 4 Bl. Comm. 21. * * *
>
> "One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' or a heart 'regardless of society duty and fatally bent

> on mischief,' unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. * * * All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." *Davis* v. *United States,* 160 U.S. 469, 484-485 (1895).

This Court has not deviated from the foundation principle that the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" is a core concept that is "universal and persistent in mature systems of law." *Morissette* v. *United States,* 342 U.S. 246, 250 (1952). *Pate* v. *Robinson,* 383 U.S. 375 (1966), is thus only a more recent illustration that this Court instinctively acknowledges that the concept of Due Process embraces this humane and historic principle, which found legislative expression in the provision of the Texas criminal law implicated herein, that a defendant unable by reason of insanity to make such a free choice between good and evil may not be treated as a criminal at the hands of the law but must be acquitted.

C. The Holdings Below That The Right To The Verdict On Insanity Required By State Law (1) Had In Fact Been Waived And (2) Would Involve No Constitutional Issues If Held Waived Conflict With The Decisions Of This Court.

1. The holding below that Petitioner waived his rights cannot be harmonized with the judgments and elucidations of this Court directed to waiver in the Federal habeas corpus context. "The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the

controlling standard." *Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

Manifestly, intentional relinquishment or abandonment, and indeed knowing and understanding the rights and privileges which are available and useful, cannot be accomplished by an insane or incompetent person. By legal prescription, that person is unable to waive any rights or privileges; and none can be waived on his behalf. No Court may Constitutionally presume intentional or knowing action by such a defendant, whoever purports to be waiving a basic right on his behalf. As he himself cannot waive those rights, those rights cannot be waived for him—by his wife, counsel selected by his wife, or anyone else who purports to speak or act on his behalf. For a Court to accept and enforce such waiver so clearly constitutes an unconstitutional deprivation of basic individual rights as to merit review of the case by this Court.

2. The holding below that rights created by State statutes could not possibly give rise to valid or cognizable Federal habeas corpus petitions is likewise antagonistic to decisions of this Court. The Court below cavalierly disregarded the reality that most if not all Federal petitions for habeas corpus arising from convictions in State Court involve some issue of State law—such as State criminal insanity provisions, e.g., *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). Likewise, issues directed to the availability or accessibility of appeal or other remedies under State procedural statutes and practices have frequently been considered by this Court in Federal habeas corpus cases and been adjudicated as violations of the Due Process or Equal Protection

Clauses of the United States Constitution; e.g., *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966) and cases cited therein; *Blackledge* v. *Perry,* 417 U.S. 21 (1974) and cases cited therein. Even in the context of civil law, this Court has held that a State may not cut off summarily a significant right granted by one of its statutes. *Bell* v. *Burson,* 402 U.S. 535 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Manifestly, the Court below was in error in holding that the acceptance of the purported "waiver" under these circumstances raised no Federal question and could proffer no issue of denial of Constitutional rights. Inasmuch as this assumption of lack of jurisdiction was the only basis it asserted for failing to consider and grant Petitioner's claim that the State had denied him the procedure which would have resulted in a mandatory judgment of acquittal, the decision below could not be sustained if it were subjected to the scrutiny of this Court.

This Court has recognized that the question as to whether a State's acceptance and enforcement of a "waiver" of rights in a criminal case comports with the Constitution is one which merits consideration as it arises in different contexts; e.g., *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 237-238 (1973) and cases cited therein; *Pate* v. *Robinson,* 383 U.S. 375 (1966). That question is presented in this case in a context never clearly decided by this Court, an alleged waiver of the historic right to be acquitted of an alleged crime committed while the defendant was insane. The decision below accepting and enforcing such a waiver is incompatible with the decisions of this Court and should not be permitted to stand without plenary review by this Court.

II. THE CONDUCT OF THE STATE OFFICIALS, VIOLATING THE LAW IN FAILING TO OBTAIN A VERDCT AS TO INSANITY AT THE TIME OF COMMISSION AND CUTTING OFF PETITIONER'S RIGHTS TO SUCH A VERDICT, WHEN THEY KNEW THE EVIDENCE DEMONSTRATED HE WAS INSANE, WARRANTS REVIEW BY THIS COURT.

The spectacle presented by this record is that of State prosecutorial and judicial officers failing to comply with a statute mandating that the jury include in their verdict a finding as to insanity at the time of the commission of the offense, and bringing their powers to bear upon the purported representatives of Petitioner to "waive" his right to such a verdict and the consequent judgment of acquittal, all the time knowing that the evidence demonstrated such insanity, with the abhorrent result of inflicting criminal liability upon a defendant who was evidently insane at the time of the commission of the alleged offense. Such conduct patently invites review by this Court.

The Court below attempted to mitigate the responsibility of the State by suggesting that the Assistant District Attorney primarily responsible for the case in 1963 was of a different opinion from the District Attorney and the psychiatrists. 498 F.2d at 628; App. I at 6a. Surely, however, the official ultimately responsible, the District Attorney, cannot escape the responsibilities of his office and his profession by assigning the case to someone who would be willing to engage in conduct and attempt to obtain a verdict which the District Attorney himself believed was improper and unsupportable. *Cf. Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Surely the District Attorney's Office in its entirety had the duty to act responsibly

upon the evidence and avoid efforts to hold open a criminal case against a person about to be declared insane because of a personal feeling in defiance of the objective evidence. The fundamental principle that the Constitution denotes a government of laws, and not of men, demands that result. Prosecutorial actions pursuant to personal feelings, and State judicial approval thereof, would bear the stamp of Constitutional approval if the decision below were to be left as the final judicial pronouncement on this subject.

The very purpose and effort of the actions of the Texas prosecutors, knowingly accepted and acted upon by the Texas District Court, apparently were to preclude or inhibit Petitioner's obtaining the full protection of the Texas statute which compelled the interpretation of the trial of the insanity and competency issues in one pretrial proceeding. The State actions had as their purpose the coercion of Petitioner's representatives into making an election not authorized or countenanced by the State law. According to the record, Petitioner was afforded only one of the twin rights provided by the State law, the right to be declared incompetent to stand trial; he was required to sacrifice the other and indeed more basic right, the right to be exculpated from criminal responsibility and to obtain a judgment of acquittal by reason of insanity at the time of the commission of the offense.

State action which thus "serve[s] to 'chill the exercise of basic constitutional rights'" is "'patently unconstitutional.'" *North Carolina* v. *Pearce,* 395 U.S. 711, 724 (1969), quoting *United States* v. *Jackson,* 390 U.S. 570, 581 (1968). "For the evil * * * is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages*

them." *United States* v. *Jackson, supra,* 390 U.S. at 583 (emphasis in original). Texas officials patently exceeded Constitutional bounds under this touchstone in achieving the result that Petitioner's sanity at the time of the commission of the offense was never adjudicated. *Cf. Santobello* v. *New York,* 404 U.S. 257 (1971), and cases cited therein. "In these circumstances," as in *Simmons* v. *United States,* 390 U.S. 377, 394 (1968), it appears "intolerable that one constitutional right should have to be surrendered in order to assert another."

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-3630

J. LOYD PARKER, JR., *Petitioner-Appellant,*

v.

W. J. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *Respondent-Appellee.*

Aug. 5, 1974

Habeas corpus proceeding was brought by state prisoner. The District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, denied the writ, and petitioner appealed. The Court of Appeals, Clark, Circuit Judge, held that record failed to sustain claims that failure to give prisoner credit for presentence confinement in state hospital deprived prisoner of due process and his right not to be twice punished for same offense, that record sustained finding that failure to present sanity issue to competency or convicting jury was part of trial tactics, and that change in testimony by witness who first stated he was not present at time of killing was not tainted by illegally obtained confession in which defendant stated witness was present.

Affirmed.

* * * * * * * * * *

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

On May 3, 1963, the day after his father was found dead, petitioner J. Loyd Parker, Jr. confessed to the killing,[1] and on May 17, 1963 he was indicted for murder. The principal issues from the inception of the proceedings were Parker's sanity at the time of the act and his competency to stand trial. Pursuant to an agreement between counsel, a hearing was held at which Parker was found incompetent to be tried and was committed to Rusk State Hospital until he recovered his sanity. In February 1969, after spending six years in Rusk, he was released; and on May 19, 1969 a jury found that he was competent to be tried. In June 1969, represented by retained counsel, Parker was convicted by another jury of premeditated murder and sentenced to 10 years imprisonment. At the June trial the prosecution, somewhat surprisingly, put on a brief case of circumstantial evidence linking Parker to commission of the crime.[2] Although Parker's attorneys had been ready with witnesses, they elected not to present an insanity defense and thus avoid potentially damaging rebuttal evidence they knew to be in possession of the State. After an affirmance of his conviction by the Texas Court of Criminal Appeals, 457 S.W.2d 638 (1970), Parker filed his first federal habeas petition, which was dismissed for lack of exhaustion. He then filed a petition in the Texas court system, but relief was denied on the merits after a full evidentiary hearing by the state habeas judge; and his decision was affirmed by the Texas Court of Criminal Appeals, 485 S.W.2d 585 (1972). On the instant petition which followed, the district court found the facts fully developed

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[1] Parker's confession was later suppressed by the trial judge.

[2] The major part of this evidence was provided by the testimony of Julian Morales, long time Parker family gardener. He testified that he heard two shots, saw petitioner Parker exit the house and drive away in his Cadillac, and that he then observed Mr. Parker, Sr. lying prone on the kitchen floor. The other evidence tended to link Parker, Jr. with the purchase of a gun similar to the one that was used to kill his father. The murder weapon was never found.

in the State habeas hearing and denied relief on the merits of all of Parker's contentions. We affirm.

Parker urges thirteen contentions before us. Three of them revolve around his bare factual allegation that he did not receive credit on his 1969 sentence for the six years spent at Rusk State Hospital after the 1963 jury found him incompetent to be tried. He alleges that this disallowance violated (1) his due process rights,[3] and (2) his right not to be twice punished for the same offense, *see* Wright v. Maryland Penitentiary, 429 F.2d 1101, 1103 (4th Cir. 1970); and denied him equal protection.[4]

Assuming arguendo, that detention and treatment at Rusk can be equated with punitive custody or punishment, this circuit distinguishes between credit for pre and post-sentence custody. Thus, in Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970), and Hart v. Henderson, 449 F.2d 183 (5th Cir. 1971) we held that due process requires a state to give credit for time spent in custody after conviction since denied credit could operate to penalize the right of appeal, but in Gremillion v. Henderson, 425 F.2d 1293 (5th Cir. 1970), we held that "there is no federal constitutional right to credit for time spent prior to sentence." However, the plenary scope of *Gremillion* has been qualified by Hart v. Henderson, *supra*, and Hill v. Wainwright, 465 F.2d 414 (5th Cir. 1972), which holds that, although there is no absolute right

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[3] He grounds this argument on the rationale of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and argues that failure to credit the time he spent at Rusk penalized the assertion of his "defense" of incompetency to stand trial just as a denial of credit for time served pending appeal was held in *Pearce* to violate due process by penalizing assertion of the right to appeal.

[4] The equal protection argument is that it is arbitrary and unreasonable for Texas to require credit for post-conviction time spent in a mental institution, Vernon's Ann.Tex.Code Crim.Pro. 46.01 § 8, but deny credit for preconviction time spent in such an institution, Tex.Code Crim.Pro. 46.02 § 10.

to presentence detention credit, a denial of such credit due to a defendant's poverty (*e.g.*, the financial inability to make bail) or to some other constitutionally impermissible basis will not be allowed to extend a state prisoner's sentence beyond the *maximum* prescribed for the crime. *See also,* Cobb v. Bailey, 469 F.2d 1068 (5th Cir. 1972) and Brown v. Beto, 359 F.Supp. 118 (S.D.Tex.1973). Although Parker alleges no such unconstitutional basis, we do not rest our decision on this lack.

In federal cases in which the sentence imposed plus time spent in pre-sentence custody totals less than the maximum for the offense, there is a conclusive presumption that the sentencing judge gave credit for the pre-sentence custody. *See, e. g.,* Bryans v. Blackwell, 387 F.2d 764 (5th Cir.), cert. denied, 391 U.S. 907, 88 S.Ct. 1658, 20 L.Ed.2d 421 (1967). Rodriguez v. Blackwell, 433 F.2d 993 (5th Cir. 1970); Hyler v. Alexander, 423 F.2d 1215 (5th Cir. 1970), and Landman v. Mitchell, 445 F.2d 274 (5th Cir.), cert. denied, 404 U.S. 1022, 92 S.Ct. 695, 30 L.Ed.2d 671 (1971). Application of a concomitant presumption is required here. Parker elected to have the jury determine his punishment. Prospective jurors were informed on voir dire that he had spent six years at Rusk undergoing treatment while incompetent to be tried. At the punishment hearing defense counsel specifically urged the jury to consider these six years in determining punishment, and the jury returned a sentence of only ten years for premeditated murder, an offense which carries a permissible punishment of imprisonment for any number of years or life. Moreover, the state habeas judge, who also conducted the trial and the punishment hearing, found "the jury was permitted to take into consideration the six years spent in Rusk by petitioner and the jury did take this into consideration and that was the reason for such minimum punishment of ten years in this case." In these circumstances, we reject Parker's bald assertion that he was denied credit for the time spent at Rusk and with it fall his related constitutional arguments.

Another set of arguments concerns the fact that no jury has ever resolved the question of Parker's sanity at the time of the offense. Relying on the testimony of the 1963 district attorney that he believed Parker insane at the time of offense and the fact that several psychiatrists were willing to testify to this, Parker asserts numerous constitutional errors. He alleges that his retained counsel's failure to submit this issue either to the competency hearing jury [5] or to the convicting jury, coupled with the fact that the prosecutors and the trial judge knew "of the defense and yet did nothing to see that it was submitted to either jury," deprived him of his Sixth Amendment right to effective assistance of counsel both in 1963 and 1969. Additionally, he argues that the fact that the sanity issue was not submitted at the 1963 competency hearing of itself was a denial of due process,[6] and that it denied him due process for the state to allow a conviction "knowing" of his insanity. As to the ineffective assistance claims,[7] the state habeas judge's

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[5] His attorneys has first indicated by written notice an intention to present both the sanity at the time of the crime and competency to be tried issues, but later decided only to present the competency to stand trial issue.

[6] He also argues that failure to present the issue of his sanity at the time of offense at the 1963 hearing denied him any chance of acquittal at that hearing and resulted in the 1969 trial violating his rights against double jeopardy. We reject this argument. It involves a fundamental misconception of the meaning of a competency determination and the function of a competency hearing. Since there is no possibility of conviction for the substantive offense, jeopardy does not attach at such a hearing.

[7] We reject Parker's contention that he was denied counsel of his choice at the 1969 trial because the state habeas judge's finding that his request for different counsel was made purely to obtain a continuance is fully supported by the record, *see* 28 U.S.C § 2254 (d); United States v. Carter, 453 F.2d 402 (6th Cir. 1971); Bowman v. United States, 409 F.2d 225 (5th Cir. 1969), and United States v. Cozzi, 354 F.2d 637 (7th Cir.), cert. denied, 383 U.S. 911, 86 S.Ct. 896, 15 L.Ed.2d 666 (1965).

findings that the decisions not to submit the sanity issue to either jury were legitimate tactical ones made by competent attorneys are fully supported by the record, *see* 28 U.S.C. § 2254(d), and are in full compliance with our "reasonably likely to render and rendering reasonable effective assistance" standards.[8] *See* Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); citing MacKenna v. Ellis, 280 F.2d 592 (5th Cir.), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960). Nor was Parker deprived of due process because the sanity question was not submitted to the jury in 1963. Parker argues that Article 932b of the Texas Code of Criminal Procedure in force in 1963, required that both issues be submitted to the jury at the competency hearing, and since he had been determined to be incompetent at the time of the hearing, he was of necessity incompetent to waive this statutory right. Even assuming we could find the state had an affirmative duty under its statute to submit the issue, the right remains purely one created by state statute and not a matter of constitutional mandate. Hence, this claim is not cognizable on federal habeas corpus. As for the argument that the state should not have tried to convict Parker, the fatal flaw is the assertion that the prosecutors "knew" Parker was insane. While the testimony at the state habeas hearing indicates that the district attorney at the time and some psychiatrists believed Parker insane, it also shows that the assistant district attorney who was primarily responsible for the case thought otherwise. Since the issue was doubtful and since it is a defendant's burden to present a *prima facie* case to overcome the presumption of sanity, Parker can only succeed by establishing that his attorneys represented him ineffectively by not presenting such a claim. We have previously rejected this very contention.

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[8] We avoid any determination of whether the prosecutor's and trial judge's knowledge of the possibility of an insanity defense was sufficient state action to bind the State of Texas to the actions of retained counsel.

Parker further asserts that the trial judge's denial of bail coupled with the prosecutor's pretrial assertion that the state would seek the death penalty if Parker challenged this denial by way of habeas corpus, operated to deprive him of his Eighth Amendment right to be free from excessive bail, and to deny him due process. The prosecutor's conduct, which gave the judge's ruling a macabre finality, might raise constitutional questions if presented to us in the proper context. However in the absence of any allegation of prejudice [9] other than increased pretrial custody, we hold that both issues are now moot.[10] Parker is now confined by virtue of a conviction in no way tainted by these alleged illegalities. *See, e. g.*, Smith v. Warden, 280 F.Supp. 827 (D.Md.1968), and Sheldon v. Nebraska, 401 F.2d 342 (8th Cir. 1968).

Parker next argues that the state obtained a crucial correction in the statement of Julian Morales by use of Parker's admittedly invalid confession, and consequently truthful testimony from morales was proscribed by the so-called "fruit of the poisoned tree" principle of Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1919).[11] The record indicates that Morales, who was the

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[9] Parker's attorneys at his 1969 trial testified at the habeas hearing that they were in no way handicapped because Parker was not released on bail.

[10] For the same reason, we reject Parker's argument that the trial judge denied him due process by incorrectly stating that he would lose credit for the time spent at Rusk if he secured bail.

[11] In *Silverthorne, supra*, the court stated the policy behind the rule as follows:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

251 U.S. at 392, 40 S.Ct. at 183, 64 L.Ed. at 321.

gardner on the elder Parker's estate, initially told investigating officers that he had neither heard nor seen anything suspicious at the time of the father's slaying. However, sometime after Parker gave his confession in which he stated that Morales had been present at his father's house when the crime occurred, Morales changed his statement to what he eventually testified at trial, *i.e.*, that he heard two shots and saw Parker fleeing the scene of the crime.

There can be no doubt that the *Silverthorne* principle, announced in a search and seizure context, is applicable to a suppressed confession case, Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1969); or that its exclusionary effect applies not only to tangible evidence but also to the testimony of witnesses. *See, e. g.*, United States v. Marder, 474 F.2d 1192 (5th Cir. 1972), and Williams v. United States, 382 F.2d 48 (5th Cir. 1967); *see generally*, Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 UCLA L.Rev. 32 (1967). However, the relevant issue in each case is broader than a sterile "but for" inquiry; rather "[t]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455 (1963). This language incorporates two previously recognized exceptions to *Silverthorne*. First, evidence acquired through a source independent of the unlawful conduct is admissible notwithstanding its connection with such conduct. *See Silverthorne, supra.* Second, if the nexus between the unlawful conduct and the discovery of the evidence has "become so attenuated as to dissipate the taint" the evidence is admissible. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.

307 (1939).[12] The facts of the instant case warrant application of the second exception. It is initially clear that this case does not involve police discovery of the name of a witness, as in Williams v. United States, *supra,* and United States v. Marder, *supra,* but rather a corrected statement by a witness previously interviewed by the police. The exact reason why Morales decided to tell the truth cannot be discerned from the record before us. It is clear that he came to the decision to change his story after being made aware of the contents of Parker's confession.

It is also clear that he decided to purge himself after he had consulted a lawyer for advice, the lawyer had told him to tell the truth, and had brought Morales to the courthouse for that purpose. Morales' reaction to the initial police inquiry may have been that he should avoid all involvement with his employer's death, even at the cost of perjury. Obviously, he had second thoughts. Can we say that the pressure of the confession must have dominated Morales' conscience to cause him to change his story? In this outer reach of the exclusionary rule, we decline Parker's invitation to speculate on the imponderables of human will and motivation, see Smith and Bowden v. United States, 117 U.S.App.D.C. 1, 324 F.2d 879 (1963). Since the facts will

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[12] The specific reasons for the trial judge's denial of Parker's motion to suppress Morales' testimony are unclear in the record of the proceedings in the trial court. They are not clarified in the opinion of the state habeas hearing judge. However, the Texas Court of Criminal Appeals apparently adopted what has become known as the "inevitable discovery rule" in its opinion. *See* Annotation, 43 A.L.R.3d 385, 404 (1972). The Supreme Court has never approved this rule and application of the rule in this circuit was rejected in United States v. Castellana, 488 F.2d 65, 68 (5th Cir. 1974); but *cf.* Gissendanner v. Wainwright, 482 F.2d 1293, 1297 (5th Cir. 1973). This rule might minimize the number of times a guilty defendant could avoid conviction but is hard to square with the deterrent purposes of the various exclusionary rules.

not permit us to tie the acquisition of the evidence clearly and directly to the confession as the court was able to do in Harrison v. United States, *supra*, we hold that whatever connection there may be between Parker's confession and Morales' testimony is "so attenuated as to dissipate the taint." Additionally we do not think it would serve the deterrent purpose of the exclusionary rule to deny to Parker's trial not merely the unlawful confession but also, truthful testimony from Morales. The purpose of the police practices which have been found to be illegal, was to extract a confession from Parker. If the police so believed Morales' first statement that they intended to accept it without further question, as Parker's exclusionary argument presupposes, then it would have been beyond the scope of their unlawful purpose in obtaining the confession to secure information about Morales, and they would have come by this information quite unexpectedly. Thus, any deterrent to future illegal police practices from the exclusion of Morales' testimony would be slight. The exclusion of the confession, which was the intended objective of the illegal police practices, is an ample deterrent. *See* Harrison v. United States, *supra* (White, J., dissenting) and Note, 115 Pa.L.Rev. 1136 (1967).

Finally, Parker contends that "the unlawful confession irreversibly tainted the entire trial." Since we have rejected his argument that the illegality of the confession requires the suppression of Morales' testimony, and since the confession was never introduced into evidence, we reject this argument also.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-3630

D. C. Docket No. CA-3-6423

J. LOYD PARKER, JR., *Petitioner-Appellant,*

versus

W. J. ESTELLE, *Director, Texas Department of Corrections, Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Texas

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 5, 1974

Issued as Mandate: November 12, 1974

APPENDIX III

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 24, 1974

Edward W. Wadsworth, *Clerk*

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

Re: 73-3630 PARKER v. ESTELLE

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk
By /s/ ANNE G. PARENT
Deputy Clerk

cc: Mr. Arthur Mitchell
Mr. Stephen M. Orr
Messrs. Robert C. Flowers
Max P. Flusche, Jr.

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-6423-C

J. LOYD PARKER, JR.

v.

W. J. ESTELLE, Director, Texas Department of Corrections

Order

After reviewing the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, the Court is of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of this Court.

It is, therefore, ORDERED that all relief sought by applicant is denied. It is further ORDERED that applicant shall deliver himself to the custody of the United States Marshal for the Northern District of Texas at the office of said Marshal in Fort Worth, Texas, on Tuesday, October 23, 1973, at 10:00 A.M., and the Marshal shall forthwith take custody of applicant and deliver him to the custody of Respondent or his authorized agent for service of the sentence imposed against him in Cause No. 68115 in the Criminal District Court No. 1 of Tarrant County, Texas. A true copy of this order shall be delivered to the United States Marshal for execution as provided herein.

It is further ORDERED that the Clerk shall transmit a true copy of this order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate, to the attorneys of record.

SIGNED and ENTERED this 15th day of October, 1973.

/s/ W. M. TAYLOR, JR.
United States District Judge

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-6423-C

J. LOYD PARKER, JR.

v.

W. J. ESTELLE, Director, Texas Department of Corrections

Findings, Conclusions and Recommendation of the United States Magistrate

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

J. Loyd Parker, Jr., applicant, is, within the meaning of 28 U.S.C. § 2241, "in custody" of respondent pursuant to a judgment of conviction and sentence of ten years imprisonment imposed against him on July 3, 1969 in Cause No. 68115 in the Criminal District Court No. 1 of Tarrant County, Texas. The conviction was affirmed on appeal by the Court of Criminal Appeals on April 29, 1970. *Parker* v. *State,* 457 S.W.2d 638 (rehearing denied August 21, 1970). Applicant subsequently made application for habeas corpus relief in the court in which he was convicted in Writ No. C-2321, pursuant to the provisions of Art. 11.07, V.A.C.C.P. That court entered its findings in a memorandum opinion, which, along with the transcript and statement of facts in that proceeding, is a part of the record in this case. The Court of Criminal Appeals denied relief

by an opinion delivered October 18, 1972, which opinion is also a part of the record in this case. Thereafter, applicant through his attorneys made application to this court. Subsequent to the filing of the application herein, and for the purpose of enabling the Court to conduct all necessary proceedings thereon, applicant was delivered to the temporary custody of the United States Marshal pursuant to an order for production of prisoner entered by this court on October 26, 1972. Pending a final determination herein, applicant was released on bond of $40,000 pursuant to an order of the Court, and is presently at liberty under that bond.

In 1963 applicant was charged with murder with malice in connection with the death of his father. On July 22, 1963, a hearing was held pursuant to the provisions of Art. 46.02, V.A.C.C.P., to determine applicant's then present insanity. After a finding by the jury that he was then presently insane, he was committed to the Rusk State Hospital for treatment, as provided by law. He was returned to Tarrant County for further proceedings on February 11, 1969, after the Director of Rusk State Hospital had certified him to be sane. On May 19, 1969, he was found to be sane by a jury and also found competent to stand trial at that time. A trial date was fixed for June 9, 1969, but on that date was continued to June 16, at which time the trial began. After the court was well into a hearing on a motion to quash the jury panel at 2:00 P.M. on that date, appellant first made it known to the Court that he was dissatisfied with his two retained attorneys. The only reasons ever advanced by applicant for his dissatisfaction were that he did not want an application for probation or a motion to have the jury assess punishment filed in his behalf. The trial court declined to permit him at that late date to discharge his attorneys in order to obtain a continuance and to retain other counsel. No application for probation was ever made prior to qualification of the jury, as permitted by law, however it appears

that applicant changed his mind and did subsequently elect to have the jury assess punishment. Applicant was found guilty of the charge and in fixing the penalty the jury was advised that applicant had been confined in the Rusk State Hospital for a period of six years. Applicant's counsel was permitted to argue to the jury that applicant had already spent six years in confinement for the offense.

Applicant's complaints can, I believe, he stated as follows:

1. He complains of a failure to have the issue of his insanity at the time of the commission of the offense presented and determined at the hearing in 1963 at which it was determined he was then presently insane and incompetent to be tried. I believe this complaint states no grounds for relief for two reasons:

A. The habeas corpus judge found, and the record fully supports a finding, that applicant's wife, and his counsel, as a matter of trial strategy, withdrew their request for a trial of the case on its merits at the time of the 1963 sanity hearing.

B. In the light of the jury's finding in the 1963 proceeding that applicant was then presently insane, and thus necessarily incompetent to be tried, the contention that a determination of applicant's insanity at the time of the commission of the offense was constitutionally mandated is, I believe, wholly without merit. This notwithstanding the fact that the statute appears to permit such a procedure, if requested by the defendant, and if consented to by the State's attorney and approved by the trial judge. To the contrary, I believe that a determination in 1963 of applicant's insanity at the time of the commission of the offense would have been constitutionally impermissable under any circumstance even with applicant's consent or at his request. Insanity at the time of the com-

mission of an offense is a defense to a criminal charge and is to be tried like other defenses in the main trial under a plea of not guilty. *Townsend* v. *State*, 427 S.W.2d 55. In the case of *Bishop* v. *U.S.*, 350 U.S. 961, the Supreme Court of the United States said:

> "The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of a free government."

The United States Court of Appeals for the Fifth Circuit has just recently stated the "elementary observation" that a conviction of an accused while he is legally incompetent violates due process. *Bruce* v. *Estelle*, No. 72-2641 (5th Cir., 9-6-73). Under the principles restated in the *Bruce* case, and other authorities cited hereinabove, I believe no defensive issue could be determined on its merits in the face of an affirmative finding of present insanity.

2. He contends that he was denied assistance of counsel of his choice because the trial judge refused to grant him a continuance after the trial had begun for the purpose of discharging his retained counsel and hiring substitute counsel. The record reflects that applicant appeared with the retained counsel, whom he later sought to discharge, on May 9, 1969, at which time a hearing was had on various motions. At that hearing he voiced no objection to his retained counsel. Again on May 19 there was another hearing at which no objection was raised. On June 9, 1969, a continuance was granted to applicant and again no criticism of or objection to counsel representing him was voiced at that time. On June 16, 1969, after trial had begun and well into a hearing on a motion to quash the jury panel at 2:00 p.m., applicant first made it known that he was dissatisfied with his two retained attorneys. As the Court of Criminal Appeals noted, the careful trial judge made an inquiry of applicant at that point as to the reasons for his dissatisfaction. Applicant stated that

he did not want an application for probation or motion to have the jury assess punishment filed in his behalf. These are the only reasons ever advanced by applicant. It appears from the findings of the trial judge entered in habeas corpus proceedings that although the clerk had prepared an application for probation and a motion for election of punishment, neither had been entered since applicant had refused to sign either of them. Since the action to which applicant had then objected had not been taken and I believe could not have been taken without his consent, I believe the holding of the Court of Criminal Appeals that the trial court did not err in declining to discharge applicant's counsel was correct. It appears that applicant later changed his mind and did elect to have the jury assess the punishment. His later request to file an application for probation was denied for the reason that it was not made until after the jury had been qualified and, therefore, not timely presented. The trial court in the habeas corpus proceeding specifically found that the belated attempt to discharge his counsel was made by applicant in an effort to obtain another continuance in his case. I believe that finding is fully supported by the record.

3. Applicant complains of the failure of his retained counsel to raise the defensive issue of insanity at the time of the offense. He now alleges that he was then insane. He charges that his attorneys were ineffective in failing to raise this issue and, as I construe his allegations, contends that because the State was aware of evidence which would have supported such a claim, the State, in failing to present it, withheld evidence favorable to him. I believe this contention is without merit. The law presumes sanity and to overcome this presumption an accused must provide "some" evidence of insanity. *U.S.* v. *Holt*, 450 F.2d 868. Although when an accused presents evidence of insanity the presumption disappears and the prosecution has the burden of proving mental capacity beyond a reasonable doubt, the prosecution has no duty to present any evidence

nor is any insanity issue raised until the accused has established a reasonable doubt as to his sanity as a matter of law. *U.S.* v. *Boatwright,* 446 F.2d 913. The record of the habeas corpus proceeding in this case clearly reflects, as both the trial judge and the Court of Criminal Appeals found, that the failure to raise a defense of insanity was the result of a deliberate trial strategy adopted by applicant, Mrs. Parker, and both of his retained counsel.

4. He complains that a statement obtained from him after his surrender was obtained in violation of his constitutional rights, and contends that without the use of the allegedly unlawfully taken confession the testitmony of Julian Morales would not have been obtained. It should be noted that the confession taken from applicant was not introduced in evidence at the trial and has not been directly used against him in any way. It further appears that Mr. Morales had for many years been an employee of the deceased and had already been interviewed by the police prior to the giving of the statement by applicant. Thus it cannot be contended that this witness was discovered as a result of applicant's statement. Mr. Morales testified at the trial and was fully cross examined by applicant's attorneys. His testimony is that when first interviewed by the police he told them that he had neither seen nor heard anything at the time of the commission of the offense. His testimony was that he made such a statement because "I didn't want to have any trouble with the family. They had been so nice to me and they were real good and helped me a lot." He later gave a written statement implicating the accused and became the principal witness against him at the trial. Mr. Morales testified on cross examination that the only reason he changed his testimony was that after consulting an attorney named Brant, the son of a former employee, Mr. Brant told him to tell the truth and then brought him to the courthouse. Both the trial judge and the Court of Criminal Appeals have found that Mr. Morales' testimony was not obtained as a result

of applicant's confession. These findings are fully supported by the record. I do not believe applicant would be entitled to relief even if his unsupported contention was correct. The substance of his argument is that because Mr. Morales changed his statement after learning that the accused had given a statement, applicant was deprived of the benefits of a false statement. The statement has been characterized as false by Mr. Morales, the witness who gave it.

5. Applicant complains that he was denied credit on the 10-year sentence imposed against him by the jury for the six years pretrial time which he spent in the Rusk State Hospital for treatment, as provided by law. I do not believe, as applicant contends, that his custody in Rusk can be equated to punishment. At the time of his commitment to Rusk he had been found to be then insane and no determination had been made concerning his guilt or innocence, nor could it ever be made unless and until he later be found competent to stand trial. His commitment was for the statutorily declared purpose of treatment rather than merely detention awaiting trial. The cases of *North Carolina* v. *Pearce*, 395 U.S. 711, cited by applicant, *Robinson* v. *Beto*, 426 F.2d 797, and other cases dealing with sentences imposed after retrial or post conviction sentence credit are all inapposite inasmuch as applicant's claim relates only to preconviction custody. Even if this custody for treatment be considered the same as ordinary pretrial detention, I believe that applicant has presented no grounds on which relief can be granted. Although the provisions of Art. 46.02, V.A.C.C.P. provide a mechanical procedure under which applicant could have been given credit for the time spent in the Rusk Hospital, this mechanical procedure is not the exclusive manner in which credit can be given. It has been repeatedly held in this Circuit that where a defendant receives a sentence which, when added to the period he has spent in pretrial custody, does not equal the maximum punishment which could have been meted out,

it is to be conclusively presumed that he was given credit for the presentence jail time. *Bryans* v. *Blackwell*, 387 F.2d 764; *Rodriguez* v. *Blackwell*, 433 F.2d 993; *Landman* v. *Mitchell*, 445 F.2d 274. The circumstances under which mechanical credit for presentence jail time is constitutionally mandated has been recently defined in the case of *Hill* v. *Wainwright*, 465 F.2d 414 (5th Cir., 8-8-72). That case holds that presentence credit must be given only if (1) a maximum sentence was imposed, and (2) if failure to make bail was because of indigency. Neither of those conditions are present in this case. In addition, the trial court found, and I believe that finding is fully supported by the 11.07 record, that in imposing the 10 year sentence the jury took into consideration the six years which applicant had spent in the Rusk institution.

6. Applicant complains that he was denied bail during the short period of time between the date on which he was found competent to stand trial and the date of trial. Actually this time amounted to only about a month. I believe this complaint states no grounds for relief. It is clear that applicant failed to pursue the state remedies then available to him to determine whether or not he was then, in fact, eligible for release on bail. In any event, as noted by the Court of Criminal Appeals, applicant has not in any way shown that his ability to defend himself was in any way impaired by his failure to be released on bail, and thus he has suffered no injury for which he can be granted a remedy.

RECOMMENDATION:

For the reasons stated hereinabove, I recommend that all relief sought by applicant be denied and that the Marshal be directed to retake custody of applicant for the purpose of delivering him to the custody of respondent.

/s/ BAILEY F. RANKIN
United States Magistrate

APPENDIX VI

COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte J. Loyd Parker, Jr.

No. 36021

June 29, 1963

Rehearing Denied Oct. 16, 1963

Prosecution for murder. The Criminal District Court, Tarrant County, Byron Matthews, J., entered an order denying bail and defendant appealed. The Court of Criminal Appeals, Woodley, P. J., held that denial of bail was not improper where evidence justified finding that defendant shot his father and no evidence was offered showing any justification or excuse for the killing other than insanity of defendant at the time, and, under circumstances, a doubt or issue as to admissibility of defendant's confession was not controlling.

Judgment affirmed.

* * * * * * * * * * *

George Cochran, Fort Worth, Charles W. Tessmer, Dallas, for appellant.

Doug Crouch, Dist. Atty., Fort Worth, J. Elwood (Dutch) Winters and Albert F. Fick, Jr., Asst. Dist. Attys., Fort Worth, and Leon B. Douglas, State's Atty., Austin, for the State.

Woodley, Presiding Judge.

This is an appeal from an order denying bail to defendant in a murder case.

The evidence introduced at the hearing is deemed sufficient to justify the trial judge in finding that the appellant

shot his father three times in the back, thereby causing his death.

No evidence was offered showing any justification or excuse for the killing other than insanity of the appellant at the time.

Under the record, a doubt or issue as to the admissibility of appellant's confession is not controlling. Ex parte Langston, 153 Tex.Cr.R. 360, 220 S.W.2d 468. Ex parte Roark, 124 Tex.Cr.R. 374, 61 S.W.2d 833.

The judgment of the trial court denying bail is affirmed.

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APPENDIX VII

COURT OF CRIMINAL APPEALS OF TEXAS

J. LOYD PARKER, JR., Appellant,

v.

THE STATE OF TEXAS, Appellee

No. 42778

April 29, 1970

Rehearing Denied Aug. 21, 1970.

Defendant was convicted before the Criminal District Court, Tarrant County, Byron Matthews, J., of murder, and he appealed. The Court of Criminal Appeals, Morrison, J., held that defendant was not entitled to relief on theory that certain judge, who had been counsel for state at time of commission of offense, sat at defendant's trial where such judge's only connection with trial was his authorization of excuse of certain jurors called for week from jury wheel prior to call of case, and judge thus did not "try the case."

Affirmed.

* * * * * * * * * *

Robert B. Billings, Dallas, for appellant.

Malcolm Dade, Special Prosecutor, Dallas, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

The offense is murder; the punishment, 10 years.

This is the same appellant who was before this Court in a habeas corpus proceeding in Ex parte Parker, Tex.Cr.App.,

370 S.W.2d 882. After the rendition of such opinion, appellant was comitted to the State Hospital for the Mentally Ill at Rusk, Texas, and some six years later the authorities at Rusk found that he had regained his sanity. He was returned to Fort Worth where a jury found him sane and capable of assisting his counsel in his defense. This trial followed.

It is contended that the evidence is insufficient to sustain the conviction, and further that the testimony upon which the state relied for conviction was obviously weak and the record affirmatively reflects that there was testimony available to the state which would have thrown additional light on the facts, which the state did not introduce or satisfactorily account for its failure to do so, requiring this Court to treat the case as one evidencing a reasonable doubt as to the sufficiency of the evidence to support the conviction. We had occasion to discuss his last contention in our recent case of Ysasaga v. State, Tex.Cr.App., 444 S.W.2d 305. With this two pronged attack in mind, we will discuss the evidence.

A long time Mexican American family retainer Morales, testified that on the morning of the homicide, while working as a gardener, he heard two gun shots from within the house and moments later appellant left the house buttoning his coat, entered his Cadillac, and drove away. As soon as he had left, Morales went to the window from which point he could see deceased lying prone on the kitchen floor. The police were summoned, entry into the house was forced, and it was discovered that deceased had been shot in the back three times. He died immediately. There were no other occupants of the house. The bullets taken from the deceased's body and one found outside were shown to be from a .38 caliber pistol which was either a Smith and Wesson or an I.N.A. weapon.

It was further shown that someone bought a .38 caliber Smith and Wesson pistol from a local store giving in payment therefor a check signed J. Loyd Parker, 69 Westover,

Fort Worth, Texas. It was shown that appellant resided at such address, and the check was introduced in evidence.

Appellant did not testify or offer any evidence in his own behalf.

The above is a succinct summary of this voluminous record.

In argument, appellant contends that the state's failure to call an employee of the bank to identify the check, and the failure of the officers to take fingerprints at the scene brings this case within the rule discussed in Ramirez v. State, 163 Tex, Cr.R. 109, 289 S.W.2d 251, and later in Ysasaga v. State, supra. With this we do not agree. In each case, there were witnesses available to the state, who were not called, who could have shed light on a vital fact necessary to prove the state's case. In the case at bar, Morales was shown to be the only person in the vicinity of the house at the time of the shooting, and no question was raised as to appellant's signature to the check in question, which was accepted for deposit at the bank. It was not incumbent upon the state to prove that ill will existed between the appellant and deceased, his father. It therefore follows that this is not a weak circumstantial evidence case in which the state was under the obligation of presenting witnesses who might have aided their case.

Appellant's third ground of error is that the Judge who sat at his trial had been counsel for the state. At most, it was shown that the Honorable J. E. Winters, who had been an assistant district attorney at the time of the commission of the offense, had authorized the excuse of certain jurors called for the week in this jury wheel county prior to the call of this case before the Honorable Byron Matthews who examined the jury as to their qualifications and actually tried the case. Though not cited, the nearest case to the one at bar is Taylor v. State, 81 Tex.Cr.R. 359, 195 S.W. 1147. There the judge determined the number of veniremen who should be called for Taylor's case alone. Here approximately

500 people were selected from the jury wheel to serve in all the courts during the week appellant was tried and the persons in charge of the central jury room, acting under the authority of Judge Winters, excused certain prospective jurors who had legal excuses. It therefore follows that Judge Winters did not "try the case" as is defined in the early case of Cock v. State, 8 Tex.App. 659.

It is next contended that the Honorable Fred Fick was disqualified from representing appellant under the terms of Article 2.08, Vernon's Ann.C.C.P., because he had been an Assistant District Attorney of Tarrant County at the time of the homicide. This question is raised for the first time on appeal. It was not shown that Fick had been "of counsel for the State" in appellant's case. At most, it was shown that Fick was present at one time when appellant was being questioned after his arrest and his name does appear as counsel for the state in the bond hearing before this Court in 1963. Had the state moved to disqualify Fick prior to trial as was done in King v. State, 104 Tex.Cr.R. 583, 286 S.W. 231, another question would have been presented.[1] Here Fick was employed to represent appellant, and no question as to his qualification was raised until after trial. Hence, it comes too late.

Appellant's application for credit for time served in the state hospital is not before us as it was not shown to have been presented to the trial court. See Article 46.02, Sec. 10, V.A.C.C.P. This is appellant's first conviction for this offense, and the rule set forth in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, has no application.

Appellant next contends that the court erred in failing to permit him to qualify the jury on the question of whether or not they should grant probation in the event of convic-

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[1] Cf. Muro. v. State, Tex.Cr.App., 387 S.W.2d 674, and Murphy v. State, Tex.Cr.App., 424 S.W.2d 231.

tion. The record reflects that the jury had been qualified for service before any application was filed.

The next contention of appellant is that the court erred in declining to dismiss his employed attorney. This question arose as follows. On May 9, 1969, a hearing was had on various motions filed by defendant, and at such hearing appellant voiced no objection to the counsel who had been retained to represent him. On May 19, 1969, another hearing was had, and no objection was raised. On the day this case was set for trial and well into a hearing on a motion to quash the panel at 2:00 p. m., appellant for the first time made it known that he was dissatisfied with his two retained attorneys. All proceeding were called to a halt, and the careful trial court made inquiry of appellant as to his reasons for dissatisfaction. Appellant stated that he did not want an application for probation or a motion to have the jury assess punishment filed in his behalf. For these reasons only he was dissatisfied with his two attorneys.[2] In Brown v. State, Tex.Cr.App., 453 S.W.2d 171, we held that the trial court did not err in declining to discharge an attorney because of an alleged conflict between counsel and appellant.

It was shown that attorney Fick had been involved with the case since February, and attorney Alexander had been active in appellant's behalf since the first week in April. Appellant made known his dissatisfaction for the first time to anyone only after the examination of the jury panel. We know of no case which would authorize an accused to halt a trial upon such flimsy pretext. Henderson v. State, 137 Tex. Cr.R. 18, 127 S.W.2d 902, upon which appellant relies, merely holds that an accused should be afforded ample time

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[2] See United States v. Cozzi, 7 Cir., 354 F.2d 637; United States v. Bentvena, 2 Cir., 319 F.2d 916; United States v. Llanes, 2 Cir., 374 F.2d 712; and Estrada v. State, Tex.Cr.App., 406 S.W.2d 448, where it was held that a defendant cannot use his right to counsel to manipulate and obstruct justice.

to consult with counsel prior to trial. This can have no application here as appellant had appeared at least twice in court with counsel, and waited until the jury were ready to be selected before making known to the court the fact that he wanted Percy Foreman to represent him rather than his two lawyers, whom the court found to be competent. The court further made it known to appellant that he would hear him personally in the absence of the jury if he felt that he was not being properly represented. At no time thereafter did appellant make any complaint as to his representation. Both counsel have appeared before this Court repeatedly through the years, and we express no doubts as to their competency.

Appellant contends that the court erred in admitting in evidence the check which was given for the purchase of the pistol, and the sales slip which reflected the sale, on the grounds that the salesman Lee was unable to identify appellant as the person who made the purchase. These items were admissible under the holding of this Court in Cox v. State, 169 Tex.Cr.R. 133, 333 S.W.2d 377. It is clearly shown that the existence of this evidence was not made known to the police through any questioning of appellant.

Appellant's motion to quash the jury panel for the week is twofold. He first complains that on the panel were prospective jurors who had been called for the previous weeks, and whose service had been postponed. This was eliminated when the careful trial judge excused all such jurors and saw to it that appellant's panel was selected from the panel actually selected for the week. His second complaint relates to those who had been excused. This is readily answered by reference to the following statement from Welch v. State, Tex.Cr. App., 373 S.W.2d 497, 501: "Had counsel desired to question her (the excused juror) being excused he should have sought process to require her to re-appear." No such effort was made in the case at bar.

Appellant's grounds of error in which he complains of argument, and which authorities do not support may be

grouped as follows: on three occasions the objection was sustained and no further ruling was requested, Van Skike v. State, Tex.Cr.App., 388 S.W.2d 716; on one occasion no objection was made, Hughes v. State, Tex. Cr.App., 433 S.W.2d 698; and two were in answer to argument made by appellant's attorney, McGowan v. State, 159 Tex.Cr. R. 10, 259 S.W.2d 218.

The remainder of appellant's contentions have been considered and are found to be without merit. What occurred during the hearing on the motion for new trial could not have any weight in passing upon this appeal unless it reflects something that occurred or did not occur at the trial.

The judgment is affirmed.

DOUGLAS, J., not participating.

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APPENDIX VIII

COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte J. Loyd Parker, Jr.

No. 45984

Oct. 18, 1972

Postconviction application for writ of habeas corpus. Facts were developed by Byron Matthews, Judge of the Criminal District Court No. 1 of Tarrant County. The Court of Criminal Appeals, Morrison, J., held that trial court properly exercised its discretion in denying accused credit for time spent in mental hospital prior to trial but following adjudication that he was incompetent to stand trial.

Petition for habeas corpus denied.

* * * * * * * * * *

Arthur Mitchell and Stephen M. Orr, of Mitchell, Yeakel, Orr & Trickey, Austin, for appellant.

Doug Crouch, Dist. Atty., and Roger W. Crampton, Asst. Dist. Atty., Fort Worth, Crawford C. Martin, Atty. Gen. of Texas, and Howard M. Fender, Asst. Atty. Gen. of Texas, Austin, and Malcolm Dade, Dallas, Jim D. Vollers, State's Atty., and Robert A. Huttash, Asst. State's Atty., Austin, for the State.

OPINION

Morrison, Judge.

This is a post-conviction application for Writ of Habeas Corpus under Art. 11.07, Vernon's Ann.C.C.P. Petitioner's conviction was affirmed in Parker v. State, Tex. Cr.App., 457 S.W.2d 638.

For the purposes of this opinion, we note petitioner was committed to Rusk State Hospital in 1963 following a hearing to determine his competency (present sanity) to stand trial. In 1969 he was returned to Fort Worth where, follow-

ing restoration of his sanity, he stood trial on the indictment pending against him.

Petitioner's first, second and fifth contentions claim that he is entitled to credit for the time he spent in the State mental hospital following the adjudication that he was incompetent to stand trial.

Initially, relying on North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, he maintains that Art. 46.02, Sec. 10, Vernon's Ann.C.C.P.,[1] is unconstitutional because it permits multiple punishment for the same offense. He contends that the six (6) years he spent in the hospital were punishment for his offense. He also claims that Art. 46.02, Sec. 10, supra, is unconstitutional because it "invidiously discriminates" between similar groups since it makes the crediting of pre-trial confinement discretionary while Art. 46.01, Sec. 8.[2] requires crediting for post-conviction hospitalization.

North Carolina v. Pearce, supra, holds that, upon a retrial and conviction, an individual is entitled to credit for

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[1] Art. 46.02, V.A.C.C.P. [932b]—Insanity in Defense or in Bar. Sec. 10

"The time a person charged with or convicted of a criminal offense is confined in a State mental hospital under this Chapter pending trial, sentencing or appeal may in the discretion of the court be credited to the term of his sentence upon subsequent sentencing or re-sentencing. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722."

[2] Art. 46.01, V.A.C.C.P. [932-1]—Mental Illness after Conviction.

Sec. 8

"The time a prisoner is confined in a mental hospital for treatment shall be considered time served and shall be credited to the term of his sentence, but he shall not be entitled to any commutation of sentence for good conduct while he is under treatment in a mental hospital.

"Sec. 8 amended by Acts 1967, 60th Leg., p. 718, ch. 299, § 2, eff. Aug. 28, 1967."

the time served under the original sentence. Pearce, supra, offers "complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence". However, that situation does not exist in the case at bar. The petitioner's hospitalization was pre-trial. Pearce, supra, does not extend to pre-trial incarceration. The constitutional implications involved in Pearce, supra, manifest themselves only after conviction. The Fifth Circuit Court of Appeals has made this distinction. In Gremillion v. Henderson, 425 F.2d 1293, decided almost a year after Pearce, supra, they held that Gremillion was not entitled to credit for time spent in jail prior to conviction. The court explicitly stated that Gremillion had no constitutional right to such credit. A few days later, in Robinson v. Beto, 5 Cir., 426 F.2d 797, they held, relying on North Carolina v. Pearce, supra, that Robinson was entitled to credit for time spent in confinement after conviction and pending appeal. Further, in Footnote (2) of our opinion in Ex parte Griffith, Tex. Cr.App., 457 S.W.2d 60, we said:

> "Robinson does not affect the discretion vested in the trial court as to credit for time served prior to sentence. In Gremillion v. Henderson, Warden, 425 F.2d 1293, the Fifth Circuit Court of Appeals held there was no federal constitutional right to credit for time served prior to sentence. See also Bennett v. Sate, Tex. Cr.App., 450 S.W.2d 652. Cf. Wright v. Maryland Penitentiary (4th Cir.) 429 F.2d 1101."[3]

We cannot escape the conclusion that if Gremillion was not constitutionally entitled to credit for pre-trial time spent in jail, Art. 46.02, Sec. 10, supra, is not unconstitutional. The statute consequently controls and we uphold

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[3] On remand, the Court of Special Appeals of Maryland, Wright v. Warden, 11 Md. App. 673, 276 A.2d 411, specifically relying on statutory, not constitutional, grounds held that a defendant is entitled to credit for pre-trial jail time where he receives the maximum sentence provided by law.

the discretion of the trial court in denying Parker credit for the time spent in the mental hospital [4] prior to trial.[5]

Petitioner's first, second and fifth contentions are overruled.

Petitioner's third, fourth and sixth contentions grow out of an agreement made by his retained counsel to only submit the question of petitioner's competency to stand trial to the jury at the 1963 sanity hearing and not to submit the issue of his sanity at the time of the commission of the offense. In order for this court to uphold petitioner's contentions, we must find that the petitioner was deprived of due process by the decision to proceed on the unitary issue alone.

In effect, petitioner asks this court to second guess the representation he received from his two retained counsel at that hearing.

Let us review the history of this case. Shortly after the homicide, petitioner's wife executed the requisite affidavit requesting a hearing on both petitioner's sanity at the time of the commission of the offense and his competency

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[4] See also State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119.

[5] Further, we note that in Schreter v. Clark, 5 Cir., 457 F.2d 1305, the court held that they would presume the sentencing judge took pre-trial jail time into consideration where the punishment assessed was less than the maximum authorized by law. The maximum punishment in the case at bar at the time of the petitioner's trial was "death or life or any term of years not less than two". Petitioner received ten (10) years at the hands of the jury. Since counsel urged the jury to give petitioner credit for the time he had spent in the hospital prior to trial, we can presume they did so since they assessed far less than the maximum sentence. The original record of petitioner's conviction, on file in this court, reveals that his counsel, Alexander, urged the jury that petitioner had spent six (6) years in the Rusk State Hospital, prior to his trial, and then stated:

> "I know you will consider . . . the long confinement he has already gone through when you set his punishment."

to stand trial.[6] Prior to the hearing, she filed an amended affidavit praying only for a determination of petitioner's competency to stand trial. In reaching her decision to amend the affidavit, petitioner's wife acted upon the advice of the two lawyers retained to defend him. The Honorable Charles Tessmer of Dallas and the Honorable George Cochran of Fort Worth were and are highly regarded by this court as most able practitioners of criminal law. Only Mr. Tessmer survives. He testified, at the 1972 habeas corpus hearing, that his decision to seek an adjudication of only one issue was a matter of trial strategy. The testimony of the Honrable J. E. Winters (presently Judge of the Criminal District Court #2 of Tarrant County), the prosecutor in charge of petitioner's case in 1963, is even more illuminating. He testified that prior to the hearing he had frequent conferences with Tessmer and Cochran and that a free exchange of information was the order of the day. He stated that he informed the lawyers that while the State might be in a poor position to establish petitioner's competency to stand trial, in view of the fact that the defense had hired all the psychiatrists and psychologists, they were ready to do battle on the question of petitioner's sanity at the time of the homicide. He informed them that he not only had lay witnesses who were willing to testify concerning the petitioner's sanity, but that he had the pattern of the case itself in his favor. Judge Winters stated that he told petitioner's attorneys, and we quote:

> "The pattern is typical. The man killed his victim, he flees from the crime, he gets rid of the weapon and then runs to his lawyer's office for cover.
>
> • • • • • • • • •
>
> "These were the facts of this case, so evidently that made an impression on them. They amended their petition and dropped the count for insanity at the commission of the offense, and we settled the matter in this courtroom."

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[6] Cf. State v. Olsen, Tex., 360 S.W.2d 398.

In view of the foregoing testimony, the failure to submit the question of petitioner's sanity at the time of the commission of the offense was, apparently, a matter of trial strategy.

Petitioner's third, fourth and sixth contentions are overruled.

Petitioner's seventh contention is that he was deprived of counsel of his choice at the time of his trial in 1969. The question of the trial court's refusal to dismiss his retained counsel during the course of the trial was discussed in our original opinion, Parker v. State, supra, and need not be further discussed here.

Petitioner's seventh contention is overruled.

Petitioner next challenges the effectiveness of his two retained counsel at the 1969 trial, in view of the fact that they did not interpose the defense of insanity, at the time of the commission of the crime, in his behalf. The Honorable William Alexander, one of those attorneys, testified at the 1972 habeas corpus hearing that his failure to defend on the ground of insanity resulted primarily from his decision not to introduce any evidence at all; that is, to rest with the State. He stated that he felt to do otherwise would open up many areas for rebuttal,[7] whereas, if he offered no evidence, he still might claim credit for the time petitioner spent in the State hospital.[8] The Honorable Fred Fick, the other attorney, testified that during the trial he, Mrs. Parker, the petitioner and Alexander, had a conference and mutually agreed to rest with the State and not present any evidence on petitioner's behalf.

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[7] Alexander stated that he had talked to Carl Freund, the best known by-line newswriter in the area, and learned that Freund was prepared to testify, for the State, that he talked to petitioner on the day of the homicide, and that he was of the opinion that petitioner was sane.

[8] See Footnote (5).

Petitioner's eighth contention is overruled.

Petitioner's ninth, tenth and eleventh contentions grow out of his assertion that he was denied bail prior to his 1969 trial.

The petitioner received a ten (10) year sentence at his 1969 trial and that conviction was reviewed by this court and affirmed. Petitioner did not then and has not now shown that he was injured in any way by the court's failure to grant him bail pending that trial. The deprivation of a right without any injury does not demand a remedy.

Petitioner's ninth, tenth and eleventh contentions are overruled.

Petitioner's twelfth and thirteenth contentions involve a statement that he gave to the police shortly after his surrender. He claims that the statement was obtained in violation of his constitutional rights and provided law enforcement officials with vital information which they used in building their case against him. First, we note the statement was not introduced in evidence and, therefore, the question of its voluntariness and admissibility are not before the court. Further, petitioner cites only one piece of evidence that the police obtained through the statement. He claims the testimony of witness Julian Morales could not have been secured without the statement. Morales, as the original opinion indicates, was a long time, family retainer. It is unreasonable to believe that police would not have eventually questioned him. The fact that Morales did not disclose his knowledge of the homicide until after being told about petitioner's confession does not establish that he would have lied when eventually questioned.

Petitioner's twelfth and thirteenth contentions are overruled.

The petition for habeas corpus is denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-906

* * *

J. LOYD PARKER, JR.,
Petitioner,

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 498 F.2d 625; A copy

of that opinion appears at Appendix 1, pp. 1a-10a of the Petitioner's Application for Writ of Certiorari.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on August 5, 1974. The Motion for Rehearing En Banc was overruled on October 24, 1974. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is correctly invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. Respondent submits that these questions may be restated and summarized as follows:

Where the Texas statute in effect at the time of a pre-trial hearing on the competency of Petitioner provided that the jury hearing such issue shall in their verdict state whether the defendant was sane or insane at the time of the commission of the alleged offense and whether the defendant is sane or insane at the time of trial and where retained counsel elects to submit only the question of insanity at the time of trial to such jury, does such failure to submit the issue of insanity at the time of the commission of the alleged offense constitute a deprivation of due process in violation of the XIV Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the XIV Amendment of the Constitution of the United States is involved herein as well as Article 932(b) of the Texas Code of Criminal Procedure in effect in 1963. The petition at page 3 sets out these provisions.

STATEMENT OF THE CASE

Petitioner was accused of the murder of his father on May 2, 1963. On July 22, 1963, Petitioner was found by a jury to be incompetent to stand trial. Petitioner was thereupon committed to a state mental hospital at Rusk, Texas where he remained until 1969.

On May 19, 1969, a jury found Petitioner to be sane.

On June 16, 1969, the trial on the murder charge began. On June 18, 1969, the jury returned a verdict of guilty, and assessed the punishment at ten years confinement in the state penitentiary.

Petitioner appealed to the Texas Court of Criminal Appeals and that Court affirmed the judgment of conviction on April 29, 1970. Parker v. Texas, 457 S.W.2d 638 (Tex.Crim.App. 1970) Appendix VII to the Petition.

He then filed a petition for writ of habeas corpus in federal court, but such petition was dismissed for lack of exhaustion.

He next filed a petition in the Texas court system, but relief was denied on the merits after a full evidentiary hearing by the state habeas judge. This decision was affirmed by the Texas Court of Criminal Appeals. Ex Parte Parker, 485 S.W.2d 585 (Tex. Crim.App. 1972) Appendix VIII to the Petition.

He then returned to federal court with a petition for habeas corpus; the district court found the facts fully developed by the state habeas hearing (Appendix IV and V to the Petition); and the Court of Appeals affirmed the judgment of the district court. Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974) Appendix I to the Petition.

At each step of the way Petitioner asserted some thirteen grounds for relief. At each step of the way these thirteen grounds for relief were found by both state and federal courts to be without merit. Among the thirteen grounds for relief were contentions which are but variations of the contentions asserted in the instant application, viz:

a. That he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States where his retained counsel chose to submit only the issue of competency to stand trial at the 1963 sanity hearing.

b. That he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States where his retained counsel

never raised the issue of insanity at the time of the commission of the offense.

c. That he was denied his right to be represented by effective counsel where his retained counsel failed to submit the issue of insanity at the time of the commission of the offense.

ARGUMENT AND AUTHORITIES

Petitioner was not denied due process in violation of the XIV Amendment of the Constitution of the United States where the Texas statute in effect at the time of a pre-trial hearing on the competency of Petitioner provided that the jury hearing such issue shall in their verdict state whether the defendant was sane or insane at the time of the commission of the alleged offense and whether the defendant is sane or insane at the time of trial and where retained counsel elects to submit only the question of insanity at the time of trial to such jury.

It should at once be noted that Petitioner nowhere asserts his 1969 conviction for murder of his father to be in any way defective. He asserts only that he was denied due process in his 1963 sanity hearing. It should be emphasized that at the time of his 1969 trial for murder, the Petitioner had been adjudicated to be then sane. His defense counsel testified at the state habeas hearing that he had an

insanity defense ready. Ct. Apls. App. 240. He had four psychiatrists and a series of lay witnesses. The psychiatrists were prepared to say that based upon their examination of him at a much later time that they would make a medical deduction and express the opinion that based on their new findings that he was at the time of the commission of the offense of unsound mine. Ct. Apls. App. 248. The psychiatrists who were available in 1963 were vulnerable on cross examination. Ct. Apls. App. 239. After Petitioner had been committed to Rusk, it was a full year before he was found to be insane and that was a matter of medical record. Ct. Apls. App. 239. There were many other reputable, knowledgeable people, who could have testified that the Petitioner knew the difference between right and wrong and understood the nature and consequences of his act. Ct. Apls. App. 241.

After the state rested and after taking all of the foregoing factors into account, the trial defense counsel discussed the matter with Petitioner, Petitioner's wife and his co-counsel. It was mutually agreed by all that they would not present any evidence at all. It was concluded that presenting testimony would not improve Petitioner's situation. Ct. Apls. App. 242 - 243.

Thus, at the time of the trial on the merits, a time when Petitioner was legally sane, he participated in making a decision to present no evidence of insanity at the time of the commission of the offense.

Pate v. Robinson, 86 S.Ct. 836, 383 U.S. 375

(1966) addresses itself only to the competence to stand trial, not to insanity at the time of the commission of the offense. Although trial defense counsel urged the trial court that accused Robinson, should be found not guilty by reason of insanity at the time of the offense, this Court did not write at all on that defense. This Court concluded its opinion by saying that if Robinson were found to be competent to stand trial, he would have the usual defenses available to an accused. 86 S.Ct. at 843, 383 U.S. at 387.

Another defense lawyer, Mr. Fred Fick, testified at the state habeas hearing that the decision not to submit any evidence on the issue of insanity at the 1969 trial on the merits was made after full discussions between Mr. Alexander, Petitioner, Petitioner's wife and himself. All concurred. Ct. Apls. App. 175 - 176.

Mr. Charles Tessmer testified that he was the trial defense counsel at the 1963 sanity hearing. Ct. Apls. App. 222 - 223. He testified that the decision to submit only the issue of insanity at the time of trial was a matter of trial strategy. Ct. Apls. App. 229. He also testified that with the quality of the evidence available to both the defense and the state he had no guarantee or assurance that he would win on the issue of insanity at the time of the offense.

Only one psychiatrist, Dr. Eudaly, has testified in any of the habeas hearings. In the state habeas hearings he testified (Ct. Apls. App. 187 to 221) that he examined the Petitioner on May 14, 1963, and that in his opinion Petitioner was psychotic on the day of

the killing but that he was competent on the day he interviewed him. With this type of evidence the court would have lacked jurisdiction to entertain any pre-trial determination of insanity. Even in 1963 pursuant to the provisions of Art. 932b, jurisdiction could be invoked only by a motion or request therefore based upon allegations that because of present insanity (Emphasis supplied) the defendant was unable to prepare a rational defense to the main charge. State v. Olsen, 3605 S.W.2d 398 (Tex.Sup. 1962). A close examination of the remainder of Dr. Eudaly's testimony will reveal that he was indeed vulnerable on cross examination. He vacillated considerably; he had been practicing psychiatry for only nine months and had never before examined a person charged with a criminal offense. Ct. Apls. App. 207.

While the petition assumes as its major premise that the Petitioner was insane at the time of the killing, it can be seen from the foregoing that this premise has never been established or found in any proceeding to this date.

Much is made of the fact that the district attorney in 1963 believed Petitioner to be insane at the time of the killing. Ct. Apls. App. 137. He was not, however, the District Attorney at the time of the trial on the merits in 1969. Ct. Apls. App. 128. Petitioner attempts to equate this belief on the part of the District Attorney in 1963 to the case in which the prosecution agrees to make no recommendation on the sentence and later recommends the maximum one year sentence, Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971), or the

case in which the prosecutor withholds evidence reflecting upon the credibility of the principal prosecuting witness. Giglio v. United States, 405 U.S. 150, 92S.Ct. 763 (1972). Certainly the conduct of the prosecutors in Santobello and Giglio is a far cry from a lay opinion on the part of the District Attorney that Petitioner was insane. No deception was practiced upon Petitioner. The man who actually prosecuted Petitioner held a different view. Ct. Apls. App. 256-257. At least the evidence shows only a disagreement between two men regarding the insanity of Petitioner at the time of the killing.

Prior to 1937 there was no legal procedure, statutory or decisional, by which a trial court could try the issue of insanity at the time of the act in a pre-trial hearing in advance of a trial on the main charge. In 1937 the Texas Legislature enacted Art. 932a, Vernon's Annotated Code of Criminal Procedure. Like its successor, Art. 932b, Art. 932a provided for a pre-trial determination of both issues of insanity. State v. Olsen, supra. As Judge Woodley formerly Presiding Judge of the Texas Court of Criminal Appeals points out, even a trial of both issues of insanity in a preliminary trial, can lead to a strange situation.

> "* * * So it is now possible for one charged with a criminal offense to be acquitted, though he has never been tried for such offense and in fact to be acquitted by a jury that has not heard the indictment read, the facts relating to the act charged, or any other evidence other than that relating to the question of the sanity or in-

sanity of the accused."

Insanity As A Bar To Criminal Prosecution by K. K. Woodley, Judge of the Court of Criminal Appeals, 3 South Texas Law Journal 204.

In 1965 the Legislature enacted Art. 46.02, Vernon's Annotated Code of Criminal Procedure, which provided only for the trial of the issue of insanity at the time of trial in advance of the trial of the main charge. See Newton v. State, 509 S.W. 2d 610 (Tex.Crim.App. 1974).

Thus the Legislature eliminated the practice of determining the issue of insanity at the time of the act in advance of the trial on the main charge by repealing Art. 932b and enacting Art. 46.02. Even if Petitioner were retried today he would not be entitled to that which he asserts to be a deprivation of due process.

It cannot be overemphasized that Petitioner nowhere attacks the validity of his 1969 trial and conviction. Curiously, he attempts to elevate the simple belief of the 1963 District Attorney to sinister and gross proportions that infect a pre-trial procedure. As the court below has observed, even though the state in 1963 had an affirmative duty to submit the issue of insanity at the time of the act to the competency jury this is a matter of state law and does not amount to a constitutional mandate. Appendix to the Petition, p. 6a.

If there were statutory defects in the 1963 competency hearing these defects became moot

when he was convicted on the main charge in 1969. Petitioner was only entitled to a fair trial and there is no evidence that he did not have a fair trial. Sheldon v. Nebraska, 401 F.2d 342 (8 Cir. 1968). See also Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 768 (1952).

Finally, it is evident from the testimony of trial defense counsel, both at the 1963 hearing and at the 1969 trial, that the decision not to go into the sanity of the accused at the time of the commission of the offense was knowingly and deliberately made. Such decision was a matter of trial tactics made by competent counsel and does not give rise to a federal constitutional question. Brewer v. Peyton, 302 F.Supp. 740, (U.S.D.C., W.D. Va. 1969), affirmed 431 F.2d 1371 (4th Cir. 1970), cert.den. 401 U.S. 994 (1971).

It is also readily apparent that the failure to raise the issue of insanity at the time of the commission of the offense constituted a waiver of such defensive matter in the trial of the main charge. Under these circumstances, the case is, in all essentials, the same as that in Merlo v. Texas, 441 F.2d 729 (5th Cir. 1971) As in Merlo there is no showing that Appellant asked to have the issue of insanity raised at trial. The question of insanity at the time of the offense was a defensive issue which the defense counsel knowingly waived, a strategical move approved in Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), cert.den. 393,U.S. 986, 89 S.Ct. 461 (1968). In Daugherty the court held that there was no evidence justifying a sanity hearing even though the judge was made aware of the defen-

dant's mental history. The Daugherty decision cited the test for competency to stand trial as whether or not the defendant had the ability to consult with his lawyer with a reasonable degree of rational understanding and whether or not the defendant had a rational and factual understanding of the proceedings.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, hereby certify that a true and correct copy of the above and foregoing Brief For Respondent In Opposition has been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of April, 1975, addressed as follows: Isaac N. Groner, Cole and Groner, P. C., 1730 K. Street, N.W., Washington, D.C. 20006.

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